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## THE BENIGN HOUSING QUOTA: A LEGITIMATE WEAPON TO FIGHT WHITE FLIGHT AND RESULTING SEGREGATED COMMUNITIES?

In 1967, the City of New York acquired fourteen square blocks on the Lower East Side of Manhattan. The city, with the assistance of federal funding, intended to build a large complex of low- and middle-income housing on the site.<sup>1</sup> Between the start of construction in 1967 and partial completion in 1972, however, the proportion of whites in the area had declined dramatically both in public housing projects and in the surrounding community.<sup>2</sup> The area, which had been stably integrated, was becoming racially transitional since, as the whites evacuated the area, their former residences were occupied generally by minorities. If the trend had continued, the area would have become inhabited predominantly by minority group members and hence segregated.<sup>3</sup> To counter the white flight from the area, the City Housing Authority by-passed its own regulations which gave priority to minority group members and provided newly constructed apartments to white applicants who were ineligible under the existing regulations.<sup>4</sup>

Plaintiffs, black and Puerto Rican tenants of the City Housing Authority, brought a class action on behalf of the present and former occupants who had been displaced from the site during construction,<sup>5</sup> demanding highest priority in admission to the project and nullification of the leases of the present white tenants.<sup>6</sup> They alleged that the refusal of the City Housing Authority to abide by its own regulation was racially motivated in contravention of the Civil Rights Act of 1964 and the Fair Housing Act of 1968.<sup>7</sup>

Under the regulation, GM 1282,<sup>8</sup> which was in effect at the time of the initial relocation, priority was limited to the original project site residents. Under the

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1. *Otero v. New York City Housing Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973).

2. Brief for Intervening-Defendants-Appellants at 10-11, *Otero v. New York City Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973).

3. In reference to the flight of middle class whites from New York City see *N.Y. Times*, May 29, 1973, at 1, col. 5.

4. See note 9 *infra* and accompanying text.

5. 484 F.2d at 1126.

6. *Id.* at 1127.

7. *Id.* The Fair Housing Act of 1968 provides, in pertinent part: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). "The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(d)(5) (1970).

The Civil Rights Act of 1964 provides, in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1970).

8. The policies of the Housing Authority are established by a board of three appointees.

later-enacted GM 1810, however, first priority status was broadened to include the residents of the entire urban renewal area of fourteen blocks.<sup>9</sup> Plaintiffs contended that although the latter regulation was adopted after the initial relocation, the City Housing Authority had bound itself by prior statements and actual practice to abide by it.<sup>10</sup>

The Authority argued that they had an affirmative duty to limit the number of public housing units available to minority groups in order to promote integrated housing and a racially stable community. It noted that allowing these minority tenants to return to the site would create a concentrated racial pocket which would further upset the already precarious racial balance of the Lower East Side.<sup>11</sup>

Speaking for the Second Circuit, Judge Mansfield noted that the plaintiffs' argument ordinarily would carry great weight. Nevertheless, the Housing Authority's constitutional duty controlled and, therefore:

the Authority may limit the number of apartments to be made available to persons of white or non-white races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.<sup>12</sup>

Accordingly, Judge Mansfield remanded the case to the lower court for a determination of whether allowing the minority displacees to return would jeopardize the racial balance of the community, stating that the Authority must produce "convincing evidence" that adherence to the neutral regulation would almost certainly lead to *de facto* segregation.<sup>13</sup>

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Once set, these broad policy determinations are formalized into staff directives and issued by the Director of Management as General Memorandum of the Housing Authority (GM).

9. The order of priority in public housing is based upon urgency of need. The objective criteria, as established by the Housing Authority, are, in order of importance: (1) area residents who were displaced in building the project; (2) emergency situations including condemnation and displacement because of other government action; (3) families or handicapped living in extremely substandard housing; (4) families residing in overcrowded conditions; (5) families residing under conditions of health hardship; (6) families residing under substandard or hardship conditions. GM 1810 (1972), cited in the appendix to *Otero v. New York City Housing Auth.*, 344 F. Supp. 737, 748-49 (S.D.N.Y. 1972).

10. 484 F.2d at 1130-32.

11. *Id.* at 1132-33. In the lower court, Judge Lasker conceded that there was such an affirmative duty. However, he concluded that the purpose of the legislation underlying the affirmative duty was to benefit the minorities. Therefore, it could not be exercised to deprive the minorities of available housing. *Otero v. New York City Housing Auth.*, 354 F. Supp. 941, 953 (S.D.N.Y. 1973). The circuit court reasoned, on the other hand, that the underlying rationale was to further integration in public housing thereby benefitting "the community as a whole, not just certain of its members." 484 F.2d at 1134. For an analysis of agencies acting in opposition to established regulations see Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629 (1974).

12. 484 F.2d at 1140.

13. *Id.* at 1136, 1140. Judge Lasker recently approved a settlement of the action as being consistent with the opinion of the court of appeals. *Otero v. New York City Housing Authority*, No. 72 Civ. 1733 (S.D.N.Y. Feb. 25, 1974), summarized at 2 CCH Pov. L. Rep. ¶ 18,640.

# I. THE HISTORY OF THE FEDERAL HOUSING PROGRAM AND THE RISE OF THE RACIAL PROBLEM

The first federal statute establishing a national public housing program was enacted in 1937 to solve the short-term housing problems of the "submerged middle class."<sup>14</sup> Under this legislation, apartment buildings were constructed by local government agencies and financed through long-term bond issues.<sup>15</sup> Upon completion they were operated by local agencies with the rent received from their temporarily impoverished tenants.<sup>16</sup> During World War II, the emphasis shifted from housing the poor to providing housing for workers in war industries and returning veterans.<sup>17</sup> Moreover, with the end of the war, Congress "primed the pumps" with FHA and VA insured mortgages to keep capital flowing into the construction industry as a hedge against depression.<sup>18</sup> As a result, the suburban housing boom began for veterans and the now-affluent middle-class who, in effect, were forced to vacate public housing to subsidize the suburban construction boom.<sup>19</sup> At the same time, however, public housing

14. Housing Act of 1937, 42 U.S.C. §§ 1401-36 (1970); see L. Friedman, *Government and Slum Housing* 94-146 (1968).

15. Currently, the term "public housing" is used in reference to several types of projects. The traditional type (and the one with which this Note is principally concerned) is based on the continual ownership of the projects by local housing authorities. An architect is retained by the authority to design and supervise the construction of the project on a chosen site. The authority raises the funds necessary for construction and manages it when completed. See *Public Housing and Integration: A Neglected Opportunity*, 6 *Colum. J.L. & Social Prob.* 253n.2 (1970) [hereinafter cited as *Public Housing and Integration*]. The "Turnkey" program is a recent innovation in the public housing area which has won approval for its efficiency and the greater opportunities it allows for involvement by private industry. The private developer approaches the authority with a lot and plans for construction which he offers to deliver at a fixed price. The proposals are formalized in a contract for sale and the next government involvement does not occur until payment upon completion of the building. Burstein, *New Techniques in Public Housing*, 32 *Law & Contemp. Prob.* 528, 529-30, 536-40 (1967); *Wall St. J.*, June 6, 1966, at 1, col. 1. The third basic program is known as "Section 23" leasing. Under this approach the local housing authority leases available private housing up to a general maximum of ten percent of the building's units. In turn, the authority sublets the units to low-income families at a lower rate. Housing and Urban Development Act of 1965, 12 U.S.C.A. § 1701z-3 (Supp. 1974), amending 12 U.S.C. § 1701z-3 (1970) (authorizing the rent supplement program); 42 U.S.C.A. § 1421 (Supp. 1973), amending 42 U.S.C. § 1421 (1970) (creating the leased housing program). Friedman & Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 *U. Pa. L. Rev.* 611 (1968).

16. 81 Cong. Rec. 8099 (1937) (remarks of Senator Wagner); "There are some people whom we cannot possibly reach; I mean those who have no means to pay the rent minus the subsidy. This, after all, is a renting proposition, not a complete gift." *Id.* See Friedman, *Public Housing and the Poor: An Overview*, 54 *Calif. L. Rev.* 642, 645 (1966) [hereinafter cited as *Public Housing and the Poor*]; *Public Housing and Integration* 258.

17. *Lanham Public War Housing Act* of 1940, ch. 862, 54 Stat. 1125, as amended, 42 U.S.C. §§ 1521-24 (1970); Exec. Order No. 9070, 3 C.F.R. 1095 (Comp. 1938-1943).

18. *Public Housing and the Poor* 650-51.

19. *Id.* at 651.

authorities were overwhelmed by the influx of minority groups into the urban ghettos as a result of the unavailability of employment, housing and educational opportunities in the white-oriented suburbs. Thus, public housing concentrations rapidly changed from low-middle-class and white to poor and black.<sup>20</sup>

Compounding the problem was the reluctance of housing authorities to enforce integration. In fact, the doctrine of "separate but equal" announced in *Plessy v. Ferguson*<sup>21</sup> practically insured that the initial public housing projects would be racially segregated.<sup>22</sup> The advent of judicially enforced integration, following *Brown v. Board of Education*<sup>23</sup> and various state statutes mandating desegregation,<sup>24</sup> failed to change the racial structure of public housing since the housing authorities, fearing public opposition, did not enforce the spirit of the neutral regulations.<sup>25</sup> This policy, at least on the federal level, began to change in the Kennedy Administration.<sup>26</sup> Also, both statutes<sup>27</sup> and lower court decisions<sup>28</sup> reinforced the policy that the housing authorities must act affirmatively to integrate public housing.

20. Report of the National Advisory Commission on Civil Disorders, 115-21 (1968) [hereinafter cited as Kerner Commission]; Mulvihill, Problems in the Management of Public Housing, 35 Temp. L.Q. 163, 175-78 (1962) [hereinafter cited as Mulvihill].

21. 163 U.S. 537 (1896).

22. See Comment, The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing, 64 Mich. L. Rev. 871, 875-76 (1966). See also H. Rodgers & C. Bullock, Law and Social Change: Civil Rights Laws and Their Consequences 141-46 (1972).

23. 347 U.S. 483 (1954).

24. See, e.g., N.Y. Pub. Hous. Law § 223 (McKinney 1955) ("no person shall, because of race, creed, color or national origin, be subjected to any discrimination").

25. See *Gautreaux v. Romney*, 457 F.2d 124, 139 (7th Cir. 1972) (Sprecher, J., dissenting). "For many years the public housing program and its federal and local administrators have contributed to the increasing segregation of the black inner city from the white suburbs through discriminatory site selection, ghetto high rise monstrosities, and pervasive foot-dragging." *Id.* (footnotes omitted); see Public Housing and Integration 258-62.

26. Exec. Order No. 11063, 3 C.F.R. 652-56 (Comp. 1959-63), 42 U.S.C. § 1982 (1970) (historical note). The order barred all discriminatory practices in federally funded public housing. Its effect has been limited, however, by the tendency of the authorities to apply it only in the area of site selection. Grier, The Negro Ghettos and Federal Housing Policy, 32 Law & Contemp. Prob. 550, 554-56 (1967) [hereinafter cited as Negro Ghettos and Federal Housing Policy]; 64 Mich. L. Rev. 871, 878-79 (1966). In addition, some critics claim that the order was more a statement of a personal position on the part of President Kennedy. They note that it was not backed by legislation for several years and by itself had very limited usage and weak enforcement provisions. Negro Ghettos and Federal Housing Policy 554; Note, De Facto Segregation in Low-Rent Public Housing, Urban L. Annual 174, 183-84 (1968) [hereinafter cited as De Facto Segregation in Low-Rent Public Housing].

27. Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1970); Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3608 (1970); see note 7 *supra*. See also Chandler, Fair Housing Laws: A Critique, 24 Hastings L.J. 159 (1972).

28. See, e.g., *Shannon v. HUD*, 436 F.2d 809, 816 (3d Cir. 1970), noted in 85 Harv. L.

On a practical level, in the major urban areas integrated public housing is becoming an economic necessity. Since the operating income of conventional public housing is derived from a pegged system under which the tenant pays a certain proportion of his income as his monthly rent, the income of the housing authority is tied closely to tenant income. Unfortunately, even in an era of economic expansion, the income level of the poor has not increased proportionately.<sup>29</sup> At the same time, the housing authorities are caught in an inflationary squeeze, forcing use of reserves for operation.<sup>30</sup> Their only immediate hope, without increased subsidies, is to retain and attract whites who generally are able to pay higher rents.<sup>31</sup>

## II. MODERN METHODS USED TO OFFSET RACIAL SEGREGATION IN PUBLIC HOUSING

To promote integrated public housing, authorities have utilized two main weapons—strategic site selection and affirmative tenant assignment. Under the first method, public housing is constructed in locations where it will be compatible with the dual purpose of promoting racial integration and eliminating deteriorating, substandard housing.<sup>32</sup> Consequently many projects have been built in the blighted inner city areas.<sup>33</sup> This inner city site selection reflected several additional factors. For example, building in a predominantly white neighborhood is more difficult because of racial and income prejudice.<sup>34</sup> Moreover, during the substantial lead-time between beginning and completing construction, the racial composition of the area often deteriorates radically due to “fleeing whites.”<sup>35</sup>

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Rev. 870 (1972); *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

29. Walsh, *Is Public Housing Headed for a Fiscal Crisis?*, 26 J. Housing 64, 65-66 (1969).

30. Mulvihill 176; Walsh, *Is Public Housing Headed for a Fiscal Crisis?*, 26 J. Housing 64, 65-66 (1969).

31. Mulvihill 175-76; Interview with Neil Hardy, Exec. Director of Rehabilitation, Mortgage Insurance Corporation, in New York City, Nov. 1, 1973 [hereinafter cited as Interview].

32. Note, *Racial Discrimination in Public Housing Site Selection*, 23 Stan. L. Rev. 63, 69 (1970).

33. Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 Law & Contemp. Prob. 490, 503-04 (1967) [hereinafter cited as *Public Housing—A Social Experiment Seeks Acceptance*]. A related deleterious effect is the construction of high rise public housing buildings. These “monstrosities” reflected the desire of public housing officials to economize in the face of high land costs. Unfortunately, the resultant buildings only reinforced the public’s distaste for the projects. *Public Housing and the Poor*, *supra* note 16, at 651-52.

34. Hearings Before the Senate Select Comm. on Equal Educational Opportunity, *De Facto Segregation and Housing Discrimination*, 91st Cong., 2d Sess. 2971 (1970) (statement of Anthony Downs).

35. Interview; see Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 Stan. L. Rev. 245, 302 n.257 (1974) [hereinafter cited as *Racial Controls in Housing*].

Affirmative tenant assignment has suffered similar ineffectiveness. For one thing, the overwhelming number of applications are from minority members unable to afford private housing.<sup>36</sup> In addition, the problems of tenant assignment are closely linked to those of site selection. When most projects are built in, or close to, ghetto areas, the greater number of available apartments are located in areas of high minority race concentration. As a result, the projects reflect the racial composition of the surrounding neighborhood; whites are loathe to live in such areas.<sup>37</sup>

Even if it were desirable, it is by no means clear that affirmative tenant selection would be received favorably by the courts.<sup>38</sup> In *Favors v. Randall*<sup>39</sup> (decided thirteen years before *Brown*), the Philadelphia Housing Authority was sued to enjoin its practice of allotting segregated housing between the races on a percentage basis.<sup>40</sup> Relying heavily on the now discredited "separate-but-equal" doctrine,<sup>41</sup> the district court upheld the validity of the quota in light of the expertise of the housing officials and the actual numerical favoritism shown to black applicants.<sup>42</sup>

With the rejection of the *Plessy* doctrine, however, the courts have viewed housing quotas more critically. In *Taylor v. Leonard*,<sup>43</sup> a New Jersey court disallowed segregated public housing and refused to employ quotas for admission. The court stated:

The use of any quota system in admitting Negroes to public housing projects is discriminatory . . . . The evil of the quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis.<sup>44</sup>

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36. De Facto Segregation in Low-Rent Public Housing 194.

37. Public Housing—A Social Experiment Seeks Acceptance 504. Before 1960, New York City followed a free choice scheme for allocating public housing. This led to complaints of racial imbalance as projects tended to reflect the racial make-up of the areas in which they were located. In order to allay criticism, the housing authorities initiated a policy of holding all vacancies in white projects for blacks and vice versa. The policy was unsuccessful. The whites refused to go to areas of high minority concentration and the blacks protested because badly needed public housing lay dormant in black areas. In 1964, the Housing Authority dropped the idea of enforced tenant assignment and adopted a "first-come-first-served" system. *Id.*

38. See Navasky, *The Benevolent Housing Quota*, 6 *How. L.J.* 30, 48-51 (1960); *De Facto Segregation in Low-Rent Public Housing* 194.

39. 40 F. Supp. 743 (E.D. Pa. 1941).

40. *Id.* at 744-45.

41. *Id.* at 747.

42. *Id.* at 747-48.

43. 30 N.J. Super. 116, 103 A.2d 632 (Ch. 1954).

44. *Id.* at 119, 103 A.2d at 633. Note, however, that the permissibility of action based on group status has long been established in certain areas. For example, the states and the federal government have laws to prohibit child labor, to favor veterans in public employment, and to support employees in their efforts to organize and bargain collectively. In all

Similarly in *Banks v. Housing Authority*,<sup>45</sup> a California court struck down the use of quotas. There, city officials attempted to distribute housing according to the existing racial composition in the neighborhood in order to preserve the same racial pattern as existed before the project. The court concluded that the practice could be overturned for several reasons, including the illegality of a state's executing a lease in such a manner as to violate the boundaries defined by the fourteenth amendment,<sup>46</sup> but based its decision on the impropriety of the state's attempted engineering of segregated racial patterns.<sup>47</sup>

Despite these early rejections of the quota system, the issue has not been settled definitively. Those initial cases involved quotas which merely reinforced segregated racial patterns in public housing whereas an *Otero*-type decision involves a quota which seeks to eliminate such segregated groupings.<sup>48</sup> Nevertheless, there is a more troubling case in the private housing sector against affirmative quotas. In *Progress Development Corporation v. Mitchell*,<sup>49</sup> a builder purchased land in an exclusive white suburb of Chicago to build fifty-one homes, one-quarter of which would be retained for sale to minority applicants. To maintain the established ratio, the original purchasers gave the corporation the right to choose subsequent purchasers of their plots. Despite the benevolent motive of the builders, the court refused to allow the quota on the grounds that any quota, if allowed, would "circumvent" the holding of *Shelley v. Kraemer*.<sup>50</sup>

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these situations, the social good achieved through emphasizing the rights of the group over those of the individual theoretically compensates for the detriment to the sub-group forced into a less favorable position. See Greenberg, *Race Relations and Group Interests in the Law*, 13 Rutgers L. Rev. 503 (1959); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 Rutgers L. Rev. 531, 553-58 (1963) [hereinafter cited as *Benign Quota*]. A more pertinent example, however, can be shown by the school desegregation cases where the year delay between the original Brown decision and the remedial order was justified by the existence of an overriding group interest. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), reaffirmed en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967). The concept of a group right to equal housing access can be inferred from *Barrows v. Jackson*, 346 U.S. 249 (1953). There, the Court refused to give damages against a white defendant who had breached a restrictive covenant by selling his property to blacks. In allowing the defendant to plead the civil rights of all blacks in acquiring property, the Court, in effect, recognized the prospective interests of an unidentified group of future black purchasers. *Id.* at 254. For an analysis of an overriding group interest in the benign quota see *Racial Controls in Housing*, supra note 35, at 275-82.

45. 120 Cal. App. 2d 1, 260 P.2d 668 (1953), cert. denied, 347 U.S. 974 (1954).

46. *Id.* at 16, 260 P.2d at 677.

47. *Id.* at 17-18, 260 P.2d at 678.

48. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1118 (1969) [hereinafter cited as *Equal Protection*]; 83 Harv. L. Rev. 1441, 1448 (1970).

49. 182 F. Supp. 681 (N.D. Ill. 1960), modified, 286 F.2d 222 (7th Cir. 1961); see 70 Yale L.J. 126 (1960).

50. 334 U.S. 1 (1948). *Shelley* involved racial covenants to exclude blacks from purchasing property in an all-white neighborhood. The Supreme Court stated that such agreements, although not illegal per se, cannot be enforced by the courts without constituting state action in violation of the fourteenth amendment. *Id.* at 20-21.



which invalidated judicial enforcement of restrictive racial covenants. The court also emphasized that a quota, even though it may be attractive to the minority at the present time, would constitute a "strait jacket . . . a mess of pottage offered in exchange for a birthright of equality."<sup>51</sup> Moreover, Judge Perry analogized quotas in housing and in employment:

A controlled integration plan with discriminatory restrictions . . . cannot be enforced in any court in the United States. It would amount to a quota system of housing and that is just as illegal as the quota system of employment . . .<sup>52</sup>

Today, of course, affirmative action including racial quotas have been approved to bring about integration in education and employment.<sup>53</sup> In addition, although the court never specifically declared it so, it impliedly set such a quota in *Gautreaux v. Chicago Housing Authority*,<sup>54</sup> a housing case. There, blacks brought a class action to enjoin the use of discriminatory site selection and tenant assignment calculated to maintain the existing pattern of residential segregation in Chicago. In the judgment order the court limited black tenancy to 15 percent in the four white projects.<sup>55</sup> Although the court did not explain its use of a quota, it has been suggested that the court's use of this limitation arose from the fear that the projects would become completely black once the tipping point was reached.<sup>56</sup>

### III. THE RATIONALE UNDERLYING THE USE OF THE TIPPING POINT AND THE BENIGN QUOTA

The argument for a benevolent quota in housing is based on the often recurring pattern of white flight when blacks begin to move into a housing project or community in significant numbers.<sup>57</sup> As the influx of minorities to the area increases, the remaining whites grow more conscious of the change-over process. Eventually, as the white flight continues, the community will cross the tipping point, *i.e.* "the theoretical maximum minority group proportion which whites will tolerate in any given area."<sup>58</sup> Thereafter, the change-over process is irreversible; a wholesale flight of whites is set off, leaving a predominantly black neighborhood.<sup>59</sup>

The purpose of the benign quota is to utilize affirmative tenant assignment

51. 182 F. Supp. at 707.

52. *Id.*

53. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-25 (1971) (education); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972) (employment).

54. 304 F. Supp. 736 (N.D. Ill. 1969) (judgment order), *aff'd*, 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922 (1971); see 83 Harv. L. Rev. 1441 (1970).

55. 304 F. Supp. at 739; see 83 Harv. L. Rev. 1441, 1447 (1970).

56. 83 Harv. L. Rev. 1441, 1447 (1970).

57. Cohen, *The Case for Benign Quotas in Housing*, 21 *Phylon* 20, 21 (1960). For an extensive discussion of the tipping phenomenon, see *Racial Controls in Housing*, *supra* note 35, at 251-60.

58. *Benign Quota*, *supra* note 44, at 533.

59. See *Racial Controls in Housing* 251-54.

in such a manner as to bring about a gradual reduction of the psychological barrier of whites to integrated living. The housing authority interjects a restriction on the normal entrance of an "invading" minority group at the maximum possible level of stability in order to assure the dominant white majority that they will not be inundated by an overwhelming influx of minorities.<sup>60</sup> Once assured of a stably integrated habitat, the two groups will gradually develop a certain degree of neighborly contacts.<sup>61</sup> As these contacts erode the whites' fear and as both races become further accustomed to integrated living, the quota—an expedient measure to be used in the transitional stage—will itself become increasingly more flexible until eventually it becomes expendable.<sup>62</sup>

The expected benefits of the minority group from use of benign quotas are substantial. Initially there are immediate material advantages as the blacks and other disadvantaged minorities—whose housing is "generally far more expensive, more crowded and less adequate than comparable housing for whites"<sup>63</sup>—are able to procure better housing and community services at a lower cost. In addition, there are psychological advantages in that the feeling of rejection caused by segregation becomes less substantial.<sup>64</sup> Finally, successful implementation of racial quotas in public housing demonstrates the feasibility of racially mixed housing in the private sector.<sup>65</sup>

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60. If the quota system is allowed by the courts, it is possible that the limit need not be established by the state. Assuming a genuine good faith effort to further integrate housing, there is no reason why a private organization could not set such a limit provided, of course, there are adequate safeguards against its abuse. See *Equal Protection* 1119.

61. See M. Deutsch & M. Collins, *Interracial Housing: A Psychological Evaluation of a Social Experiment* 122-23 (1951). This study of several segregated and desegregated public housing projects in the Northeast is the first and most widely cited authority in the area. The results showed that residents in desegregated projects held more favorable attitudes toward members of another racial group than did those tenants in the segregated projects. *Id.* The general theory under which the benevolent quota operates is that "tolerant racial attitudes by members of each race toward the other are positively associated with: (1) the amount of current equal-status interracial contact (neighboring); (2) the degree of previous equal-status contacts with members of other [sic] race; (3) the length of residence within a desegregated housing environment; and (4) the lack of perceived status threat from living in a desegregated residential surrounding." Ford, *Interracial Public Housing in a Border City: Another Look at the Contact Hypothesis*, 78 *Am. J. of Soc.* 1426, 1430 (1973).

62. See *Benign Quota* 535; see Comment, *Race Quotas*, 8 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 128, 177-78 (1973) [hereinafter cited as *Race Quotas*].

63. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 *Nw. U.L. Rev.* 363, 391 (1966).

64. Green, *Reparations for Blacks?*, 90 *Commonweal* 359, 360-361 (1969) [hereinafter cited as *Reparations for Blacks*]. For a discussion of the psychological harm caused to both black and white by segregation see A. Davis, *The United States Supreme Court and the Uses of Social Science Data* 120-29 (1973); cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The long-term social and economic opportunities within the society for the minorities also are enhanced. *Race Quotas* 159-60.

65. See Note, *Racial Discrimination in Housing*, 107 *U. Pa. L. Rev.* 515, 539 (1959) [hereinafter cited as *Racial Discrimination in Housing*].

There are, of course, substantial criticisms. On a practical level, generally it will prove much more difficult for a black to acquire suitable private housing than a corresponding white. Therefore, if a black is refused available public housing because he is not within the quota, the burden of finding housing elsewhere is much greater.<sup>66</sup> Another detrimental factor may be the additional hostility aroused in whites at being forced to accept blacks as neighbors or, possibly, having their applications refused because of their majority status.<sup>67</sup> Psychologically, the classification according to race, despite the benevolent objective, is not a particularly attractive concept. Although the majority member feels no racial stigma because of his color, the use of the benign quota implies to both black and white that the former is racially inferior and needs special state protection.<sup>68</sup>

Perhaps the primary criticism is found in the nature of the tipping point itself. In reality, it is merely an estimate of white racism and reaction to the black encroachment. As a result, it is subject to a wide range of fluctuation in response to many subjective factors such as the geographic location, the intensity of community prejudice, the availability of low cost private housing and abuse by those officials, including judges, charged with implementing the quota.<sup>69</sup> Indeed, the quota could become a strait jacket which would inhibit rather than advance the cause of racial integration.<sup>70</sup> To prevent such abuses would necessitate constant legal supervision by an already overburdened judiciary.<sup>71</sup>

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66. *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968). "It is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees." *Id.* at 931; see *Kerner Commission* 118-19.

67. See *W. Ford, Interracial Public Housing in Border City* 72-73 (1972). Despite the fact that the majority of both races stated that their views towards the other race became more favorable rather than less so, a large minority claimed no change in attitudes and 42 percent of the whites tested showed that their attitude towards the blacks had become less favorable. Ford, however, states that "it would appear as if the threat of a 'Negro invasion' precipitated more negative feelings toward blacks than did actually residing in a desegregated project." *Id.* at 60.

68. *Bolner, Toward a Theory of Racial Reparations*, 29 *Phylon* 41, 43 (1968); *Reparations for Blacks* 360-61. But see Judge Scileppi's criticism of this approach in *Vetere v. Allen*, 15 N.Y.2d 259, 271-75, 206 N.E.2d 174, 178-80, 258 N.Y.S.2d 77, 83-86 (Scileppi, J., dissenting), cert. denied, 382 U.S. 825 (1965).

69. *Racial Controls in Housing*, *supra* note 35, at 255; *Racial Discrimination in Housing*, *supra* note 65, at 538.

70. *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681, 707 (N.D. Ill. 1960), modified, 286 F.2d 222 (7th Cir. 1961); *Benign Quota* 558-59; *Race Quotas* 168.

71. In the past, the judiciary has felt unqualified to act in this area. As a result, traditionally it has declined to interfere in the regulation of public housing unless a clear abuse of administrative power has been shown. *Thompson v. Housing Auth.*, 251 F. Supp. 121, 124 (S.D. Fla. 1966); see *Green St. Ass'n v. Daley*, 250 F. Supp. 139 (N.D. Ill. 1966), *aff'd* on other grounds, 373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932 (1967); cf. *Note, Violations by Agencies of Their Own Regulations*, 87 *Harv. L. Rev.* 629, 650 (1974). Such an active role, however, is not completely alien to the courts which have acted, albeit reluctantly, in the areas

#### IV. VALIDITY OF THE BENIGN QUOTA IN PUBLIC HOUSING UNDER THE FOURTEENTH AMENDMENT

From a constitutional viewpoint, the pivotal question in determining whether the housing authorities will be allowed to use the benign quota, or whether its use will be denied them as a violation of the fourteenth amendment's equal protection clause, is the standard of review chosen by the courts.<sup>72</sup> The standard of review in equal protection cases depends on several key concepts. In most situations, the equal protection clause merely requires that the legislation be found "reasonable in light of its purpose."<sup>73</sup> However, where either a fundamental interest or a suspect classification is involved, the state, in addition to meeting the rational basis test, bears a "far heavier burden of justification,"<sup>74</sup> as the courts have adopted a stricter standard of review, a more "rigid scrutiny."<sup>75</sup>

Under the stricter standard of judicial review, if the interest is deemed fundamental, then any legislation which would substantially impinge upon its exercise must undergo the rigors of the compelling state interest test in order to be upheld.<sup>76</sup> Until recently, the status of a "right" to housing as a fundamental interest was unsettled.<sup>77</sup> The Supreme Court had indicated both an awareness of the pressing importance of housing and a concern for equal access.<sup>78</sup> However, the "Burger" Court apparently has retrenched against the extension of the fundamental interest concept into new areas.<sup>79</sup> In an eviction case, *Lindsey v. Nor-*

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of civil rights when no other branch of government was willing to do so; see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (reapportionment); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (education).

72. Equal Protection, *supra* note 48, at 1106-07; see Benign Quota 544-58; Race Quotas 173-80. See also Frederick, *The Legality of Affirmative Measures to Achieve and Maintain Integration in a New Town*, 59 Geo. L.J. 335, 340-47 (1970).

73. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

74. *Id.* at 194 (1964); see *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

75. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

76. Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 *Fordham L. Rev.* 605, 610 (1973); *Equal Protection* 1120-21.

77. The rationale advanced by the supporters of the proposition is based on two arguments. First, studies have indicated the crucial relationship between a suitable place to live and normal mental development. See, e.g., G. Grier & E. Grier, *Equality and Beyond* 31-50 (1966); Spengler, *Population Pressure, Housing, and Habitat in Housing* 5-11 (Everett & Johnston ed. 1968). In addition, inadequate housing is generally a reflection of poverty or racial discrimination both of which are "suspect classifications." Note, *Low-Income Housing and The Equal Protection Clause*, 56 *Cornell L. Rev.* 343, 346-48 (1971); see Note, *Decent Housing as a Constitutional Right—42 U.S.C. § 1983—Poor People's Remedy for Deprivation*, 14 *How. L.J.* 338 (1968).

78. *Hunter V. Erickson*, 393 U.S. 385, 388-91 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Block v. Hirsh*, 256 U.S. 135, 156 (1921). The Supreme Court has found that the right to a property interest in land is "an essential pre-condition to the realization of other basic civil rights and liberties which the [fourteenth] Amendment was intended to guarantee." *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).

79. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doc-*

met;<sup>80</sup> the Court rejected appellants' argument that the need for shelter and the "right to retain peaceful possession of one's home" are fundamental interests;<sup>81</sup>

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing . . . are legislative, not judicial, functions.<sup>82</sup>

It is clear that the individual has no constitutionally protected, fundamental right to adequate housing. Therefore, the next question to be asked in determining the standard of review to be adopted by the courts is whether racial classifications when used in a benign context will elicit the lesser, rational basis test, or whether they will trigger the active review which the Court has generally adopted when evaluating suspect classifications.

In the past the less stringent standard generally has been employed by the courts in the areas of economic and social legislation.<sup>83</sup> Basically, the decision to uphold such a classification as valid rested upon merely showing a rational relationship between the use of the racial classification and a legitimate state purpose of dividing the applicants along racial lines.<sup>84</sup> Several courts, in holding benevolent racial classification constitutionally permissible in the areas of employment and education, have implied that this lesser standard will be followed.

In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*<sup>85</sup>—involving employment under the Philadelphia Plan, an affirmative scheme de-

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trine on a Changing Court; A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 12-15 (1972). Chief Justice Burger has indicated dissatisfaction with the rigidity of the strict standard. *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). Last term, the Supreme Court determined that a new "fundamental right" would only be found if "explicitly or implicitly guaranteed by the Constitution." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

80. 405 U.S. 56 (1972).

81. *Id.* at 73.

82. *Id.* at 74.

83. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); see, e.g., *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 31-34, 40-44 (1973); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972). See also Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972).

84. Perhaps the clearest statement of the rational basis test was voiced by Chief Justice Warren in *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961): "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

85. 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

signed to encourage employment of minority workers on federally subsidized construction projects—, the court impliedly used the lesser, rational basis standard of review. It based its holding on the rational connection between the executive branch's use of a quota and its desire to develop the largest possible pool of skilled labor from which to draw workers in projects in which the government has an interest.<sup>86</sup> Similarly, in a recent Second Circuit decision, *Pride v. Community School Board*,<sup>87</sup> involving the assignment of children because of their race to a school away from their neighborhood, the court implied that the less stringent rational basis test would be applied where racial classifications are used for a benevolent purpose:

Cases applying that [stricter] standard invariably involve state action having a segregatory or discriminatory effect. *No court has applied the test where state action has had the effect and objective of reducing discrimination and segregation.*<sup>88</sup>

Despite the fact that the rational basis standard can be satisfied easily in public housing by the desirability of assuring integrated housing, it has not been and should not be employed in this context. A clear distinction can be made between the use of the benign quota in housing and its use in other areas. In education, for instance, none of the pupils supposedly will suffer. Since the public school system provides an education for all children, all will receive the additional benefit of attending an integrated school. In housing, however, in spite of the benevolent context in which it is framed, both black and white will be excluded because of race.<sup>89</sup> Those who are turned away must obtain housing on the open market. As previously noted, the effect on the minorities is especially detrimental because of the greater likelihood that they will be unable to procure suitable alternative housing.<sup>90</sup>

Although the rationale behind the use of the stricter standard was not clearly developed in *Otero v. New York City Housing Authority*,<sup>91</sup> Judge Hays concluded in *Pride* that the *Otero* court had adopted the stricter standard because of the outright denial of new public housing based on race.<sup>92</sup> Under this standard, in addition to demonstrating the rationality of the quota system, the state must demonstrate a far heavier burden of justification.

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86. *Id.* at 171.

87. 488 F.2d 321 (2d Cir. 1973).

88. *Id.* at 326-27 (emphasis added). The rationale underlying the use of racial classifications in this context is that their objective is to "remedy, not perpetuate, racial discrimination." Race Quotas, *supra* note 62, at 175. Supporters of the benign quota make a distinction between discrimination with an invidious purpose and that without. See E. Corwin, *The Constitution and What It Means Today* 414 (perm. ed. rev. H. Chase & C. Ducat 1973). The assumption is that the courts will be able to evaluate the purpose and use of the quota to decide if it is, in reality, benevolent and should be allowed. *Id.*

89. 488 F.2d at 327 n.3; *Otero v. New York City Housing Auth.*, 484 F.2d 1122, 1136 (2d Cir. 1973).

90. See note 66 *supra* and accompanying text.

91. 484 F.2d 1122 (2d Cir. 1973).

92. 488 F.2d at 327 n.3.

Clearly, benign quotas are rational. Nevertheless, it is not so clear that state housing authorities can justify their use when confronted with the compelling state interest test. A ground which can be suggested to meet this burden is the conjunction of two separate factors: first, the necessity of overcoming the specific segregatory effect of past governmental actions and, second, the growth of a strong national policy favoring integration.

Initially, for the government to succeed in its affirmative duty of furthering integrated public housing, it must offset past and present governmental practices which have contributed, either purposely or as an unintended collateral effect, to the growth of segregated inner city public housing.<sup>93</sup> For example, in the past the federal government has subsidized the growth of the predominantly white suburban rings around our urban areas through credit assistance and mortgage insurance. Until the late 1950s, government officials, in order to protect the government investment, openly suggested that these new neighborhoods use restrictive racial covenants to protect themselves from invasion by incompatible racial and social groups.<sup>94</sup> Moreover, despite post-*Brown* changes in government policy, the pattern of residential segregation which characterizes suburban areas remains unchanged as the "self-reinforcing nature of residential segregation"<sup>95</sup> is enhanced by the discriminatory practices of the private housing industry.<sup>96</sup> Although the government no longer directly fosters racial segregation in the suburbs, it does so indirectly by permitting limited government subsidies in the form of income tax deductions for both local property taxes<sup>97</sup> and interest payments on the home-owners' mortgage debt.<sup>98</sup>

Inside the city, racial integration in private housing has been retarded effectively by an unwritten agreement between the government and financial institutions such as banks and insurance companies, that areas of high minority race concentration are risky areas for investment because of their "unfavorable economic future."<sup>99</sup> Additionally, the slum clearance program, although a source of badly needed housing, has had the unfortunate side effect of increasing the

93. See H. Rodgers & C. Bullock, *Law and Social Change: Civil Rights Laws and Their Consequences* 141-46 (1972); Southern Regional Council, *The Federal Executive and Civil Rights* 37-38 (1961) [hereinafter cited as *Federal Executive and Civil Rights*]. It has been suggested that the government is so intrinsically intertwined in the process as to be "constitutionally responsible" for segregated housing. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 *Calif. L. Rev.* 275, 330-33 (1972).

94. Hearings Before the Senate Select Comm. on Equal Educational Opportunity, *De Facto Segregation and Housing Discrimination*, 91st Cong., 2d Sess. 2755 (1970) (remarks of Secretary Romney) [hereinafter cited as *De Facto Segregation and Housing Discrimination*]; see, e.g., R. Weaver, *The Negro Ghetto* 217-22 (1948); *Federal Executive and Civil Rights* 37-38; *Negro Ghettos and Federal Housing Policy*, *supra* note 26, at 554.

95. U.S. Comm'n on Civil Rights, *Racial Isolation in the Public Schools* 38 (1967).

96. *Id.* at 33; See H. Rodgers & C. Bullock, *Law and Social Change: Civil Rights Laws and Their Consequences* 143 (1972).

97. *Int. Rev. Code of 1954*, § 164(a)(1).

98. *Id.* at § 163(a).

99. *De Facto Segregation and Housing Discrimination*, *supra* note 94, at 2755 (remarks of Secretary Romney). Such a policy not only restrained involvement by the private housing

pressure for available public housing from displaced minorities.<sup>100</sup> Finally, the structure of the federal housing program, which allows for extensive decentralization of control to local authorities, often has proved a hindrance to the use of site selection and other programs to effectuate integrated public housing because local officials are more susceptible to pressure from the local populace.<sup>101</sup>

In light of the ineffectiveness of past remedial regulations, the Supreme Court has adopted extensive affirmative remedies in other areas. In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>102</sup> the Court held a neutral pupil assignment plan unacceptable to carry out the mandate of *Brown* because it was inadequate to remedy "the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size . . . ."<sup>103</sup> In its place, the Court set out broad guidelines of affirmative action including racial quotas.<sup>104</sup> Despite the warning of the Court as to the limited use to be allowed for racial quotas,<sup>105</sup> a clear analogy can be drawn between the state's promotion and maintenance of segregation in public housing and in public education. In both, discriminatory practices have deprived the minority of equal opportunities to enjoy a government-provided benefit. Therefore, in light of the affirmative duty to further integrate housing, it is quite plausible that a benevolent racial classification should be allowed as one method to reverse the racial discrimination which governmental action has helped to create. This conclusion is supported by the broad remedial power of the court in the area of integration.<sup>106</sup>

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sources in these areas but also contributed to their physical deterioration, adding further incentive for whites to leave.

100. *Hart v. Community School Bd.*, No. 72-1041, at 53 (E.D.N.Y. Jan. 28, 1974); see, e.g., Note, *The Federal Courts and Urban Renewal*, 69 Colum. L. Rev. 472, 474-76 (1969). For an example of a somewhat successful program, however, see Gergen, *Renewal in the Ghetto: A Study of Residential Rehabilitation in Boston's Washington Park*, 3. Harv. Civ. Rights-Civ. Lib. L. Rev. 243 (1967).

101. *Public Housing and Integration*, supra note 15, at 260-62.

102. 402 U.S. 1 (1971).

103. *Id.* at 28.

104. *Id.* at 22-31.

105. *Id.* at 22-23.

106. *Id.* at 15-16; see, e.g., *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973), where the Court said: "In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." (citation & footnote omitted). See also *Brown v. Board of Educ.*, 349 U.S. 294 (1955), wherein the Court observed: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300 (footnotes omitted). In a related context, the courts have recognized the need for affirmative action to end voting discrimination. In response to federal legislation, the southern states enacted neutral regulations for registering voters. Nevertheless, they proved ineffective to increase black registration. As a result, the Fifth Circuit adopted a "freezing" concept under which presently neutral voting qualification tests were suspended so that blacks could be registered under the lighter standards which had been applied to whites in the past. *United States v. Lynd*, 349 F.2d 785, 787 (5th Cir. 1965); *United States v. Ward*,



In *Louisiana v. United States*<sup>107</sup> which invalidated a state test used to deprive the blacks of their right to vote, Justice Black noted that:

the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.<sup>108</sup>

In conjunction with the need to overcome the effect of past governmental actions which have enhanced the growth of segregated urban areas, the heavy burden of justification can further be met by the development of a strong national policy toward affirmative action to eliminate racial segregation in housing. Ever since the Kennedy Administration, it has been the official policy of the executive branch of the federal government to eliminate segregation in public housing.<sup>109</sup> Similarly, congressional awareness of the problem and the need for an effective remedy is demonstrated clearly by the discretion Congress has delegated to federal housing authorities in dealing with the problems of the urban areas.<sup>110</sup> Under the Housing Act of 1949, race was not of prime congressional concern.<sup>111</sup> By 1964, however, Congress ordered them not only to take cognizance of race as a factor in public housing, but also to veto any plan which would have the end effect of segregated housing.<sup>112</sup> Four years later, prodded perhaps by the urban ghetto riots,<sup>113</sup> Congress directed the federal housing authorities to take affirmative action to achieve and promote fair housing.<sup>114</sup>

Judicial recognition of the problem and of the need for affirmative action to

349 F.2d 795, 802-05 (5th Cir. 1965). For a discussion of "the freezing doctrine" see Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051, 1137-49 (1965).

107. 380 U.S. 145 (1965).

108. *Id.* at 154.

109. Exec. Order No. 11,063, 3 C.F.R. 652-56 (Supp. 1962), 42 U.S.C. § 1982 (1970) (historical note).

110. See *Shannon v. HUD*, 436 F.2d 809, 816 (3d Cir. 1970). The attitude toward public housing and integration prevalent in the legislative branch is particularly important. Unlike the executive, who is elected for a four-year term of office, and the judiciary, which serves on good behavior, the House of Representatives must face re-election every two years. Consequently, they tend to reflect the will of the populace much more accurately than do the coordinate branches.

111. See 42 U.S.C. § 1441 (1970); cf. *Shannon v. HUD*, 436 F.2d at 816.

112. 42 U.S.C. § 2000(d)-(d) (1) (1970); see note 7 *supra*.

113. Public Housing and Integration, *supra* note 15, at 258-59. Political support for the public housing program has fluctuated. Initially the middle class who, during the Depression, saw themselves to be the primary beneficiaries of the program, supported it enthusiastically. When the projects began to fill their rent rolls with minority group members, the mass political appeal of public housing was seriously impaired. During the 1950s a great hostility toward the program flourished in Congress and several times it came to the brink of being discontinued, see 101 Cong. Rec. 12107 (1955) (remarks of Rep. Smith) (famous socialized public-housing project is as dead as a doornail.); Mulvihill, *supra* note 20, at 167-68. With the 1960s, however, and the urban ghetto riots, the public housing program has recovered some of its lost popularity. Public Housing and Integration 258-59.

114. 42 U.S.C. §§ 3601-3608 (1970).

further integration has paralleled the growth of executive and legislative concern. In *Brown*, the Supreme Court took judicial notice of the psychological and sociological harm caused by segregation in the classroom, yet it seemed unaware of any need for affirmative action.<sup>115</sup> In the intervening twenty years, however, the Court, faced by local recalcitrance to obey its mandate, has moved from a standard of "all deliberate speed"<sup>116</sup> to a strong affirmative stance including the use of racial quotas to achieve desegregation.<sup>117</sup> The lower courts also have mandated racial quotas as a method for desegregating the schools.<sup>118</sup> For example, in *DeFunis v. Odegaard*,<sup>119</sup> a white applicant who had been refused admission to the state law school despite his superior qualifications brought suit to restrain the state law school from accepting black applicants whose qualifications were less impressive than his own. The state court refused to issue a restraining order on the ground that the state has an "overriding" interest in procuring a better representation of minorities in its law school.<sup>120</sup> Although the Supreme Court has not encountered the question of benign classifications specifically in housing, several lower federal courts have endorsed the use of racial classification in this area,<sup>121</sup> reasoning:

Where [a racial classification] is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.<sup>122</sup>

## V. CONCLUSION

Segregation in housing is a harmful reality. In conjunction with other types of discrimination such as that evidenced in employment and education, it has formed the bulwark of a racially divided society.<sup>123</sup> Over the last decade, however, the executive, legislative, and judicial branches of government have em-

115. *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

116. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

117. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-25 (1971); *Green v. County School Bd.*, 391 U.S. 430, 439 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." Last term, the Court reemphasized that neutral regulations, even if they had been in effect for many years, did not allay the state's affirmative duty to integrate public schools where a current segregated system existed largely because of a pre-*Brown* state imposed dual system. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 (1973).

118. E.g., *Booker v. Special School Dist.*, 351 F. Supp. 799, 810 (D. Minn. 1972).

119. 82 Wash. 2d 11, 507 P.2d 1169, vacated as moot and remanded, 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974) (per curiam).

120. *Id.* at 33, 507 P.2d at 1182.

121. See *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Garrett v. City of Hamtramck*, 357 F. Supp. 925 (E.D. Mich. 1973).

122. *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 932 (2d Cir. 1968) (footnotes omitted). In light of *Otero, Pride, and Norwalk*, it is inferable that the Second Circuit has decided as a matter of policy that racial qualifications will be allowed provided they are for a genuinely benevolent purpose.

123. *Hart v. Community School Bd.*, No. 72-1041, at 48-61 (E.D.N.Y. Jan. 28, 1974).

ployed affirmative remedies, including benign racial classifications, to assure greater equality in public and quasi-public employment and education. Unfortunately, despite the long-term possibilities opened up by new types of public housing,<sup>124</sup> the measures currently available for use by the housing officials to maintain integrated urban areas have proven largely ineffective.

In light of this, judicial recognition of the benign quota, as a constitutionally permissible measure, is desirable on several grounds. First, such a recognition reaffirms the existence of a community interest in maintaining a balanced racial atmosphere.<sup>125</sup> Second, judicial cognizance of the tipping process and the need for affirmative action to retain fleeing whites in racially transitional housing developments should lead to the acceptance of the need for a more innovative judicial approach in correcting this type of segregation.

In *Otero*, Judge Mansfield established a very stringent standard in the heavy burden of justification he placed on the government's attempt to use it.<sup>126</sup> Under this test, the benign quota could only be used as a preventive mechanism to maintain integration in a critically threatened area. Unfortunately, at that point it is questionable whether even the introduction of such a stabilizing factor could meet with much success. Therefore, benign racial quotas should be allowed as an affirmative access tool to head off white flight at an earlier stage and also to introduce substantial numbers of minorities into what are now predominantly white projects. Following the rationale advanced above, quotas would also be permissible for the latter purpose, provided adequate safeguards against their abuse are established.

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124. See note 15 *supra*. For more ambitious suggestions, such as population movements through persuasive government tactics, see Zelder, *Residential Desegregation: Can Nothing Be Accomplished?* 5 *Urban Affairs Q.* 265, 274-76 (1970). Note also the pessimistic attitude toward the possibility of using conventional public housing as a mode for integrated living in Solomon, *Housing and Public Policy Analysis*, 20 *Pub. Policy* 443, 452-55 (1972).

125. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Barrick Realty Inc. v. Gary*, No. 73-1279 (7th Cir. Jan. 24, 1974).

126. 484 F.2d at 1135.